Supreme Court, U.S.
FILED
AUG 28 2000
CLERK

(2)

No. 00-156

In The

# Supreme Court of the United States

PRODUCTION CREDIT ASSOCIATION OF EASTERN NEW MEXICO,

*Petitioner,*

v.

TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Appeals Of New Mexico**

## BRIEF IN OPPOSITION

PATRICIA MADRID
Attorney General

DONALD F. HARRIS*
BRUCE J. FORT
Special Assistant Attorneys General
Post Office Box 630
Santa Fe, New Mexico 87504-0630
(505) 841-6583

*Counsel for New Mexico Taxation and Revenue Department*

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19pp

## QUESTION PRESENTED

Did Congress intend to eliminate the States' long-standing authority to tax privately-owned Production Credit Associations when it amended 12 U.S.C. § 2077 in 1985?

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE CASE ..... 1

A. History of the Production Credit Associations .. 2

B. The Decision Below ..... 4

C. Misstatements of Fact ..... 5

REASONS FOR DENYING THE WRIT ..... 6

A. CERTIORARI SHOULD NOT BE GRANTED WHERE THE SAME QUESTION IS CURRENTLY BEFORE THE COURT ..... 6

B. CERTIORARI SHOULD NOT BE GRANTED WHERE THE COURT BELOW CORRECTLY DETERMINED THAT CONGRESS' INTENT TO SUBJECT PCAs TO STATE INCOME TAX WAS CLEAR, OBVIATING THE NEED FOR IMPLYING AN IMMUNITY UNDER *McCULLOCH v. MARYLAND* ..... 7

1. Where a Limited Immunity is Established by Statute, No Broader Immunity Should Ordinarily be Implied ..... 7

2. PCAs Are Not So Closely Connected to the Federal Government as to Require a Presumption of Immunity from State Taxation ..... 9

CONCLUSION ..... 13

# TABLE OF AUTHORITIES

Page

CASES

*Andrews v. Federal Home Land Bank of Atlanta*, 998 F.2d 214 (4th Cir. 1993) ..... 10

*Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821 (1997) ..... 9, 10

*Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) ..... 11

*Department of Revenue of Oregon v. ACF Industries, Inc., et al.*, 510 U.S. 332 (1994) ..... 8

*Director of Revenue v. CoBank, ACB*, No. 99-1972 (*cert. granted*, June 26, 2000) ..... 1, 6

*Farm Credit Serv. of Mid-America v. Department of State Revenue*, 705 N.E. 2d 1089 (Ind. Tx. Ct. 1999) ..... 5, 10

*Hanna v. Federal Land Bank Ass'n of Southern Illinois*, 903 F.2d 1159 (7th Cir. 1990) ..... 10

*Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994) ..... 10

*In re Hoag Ranches*, 846 F.2d 1225 (9th Cir. 1988) ..... 10

*In re Petition of Farm Credit of Western New York, et al.*, Docket Nos. 816576, 816605 and 816606 (N.Y. Div. of Tax Appeals 1/13/2000) (RIA State and Local Taxes) ..... 5

*Lebron v. Nat. R.R. Passenger Corp.*, 513 U.S. 374 (1995) ..... 10

*Mayo v. United States*, 319 U.S. 441 (1943) ..... 11, 12

*McCulloch v. Maryland*, 17 U.S. (4 *Wheat.*) 316 (1819) ..... 1, 4, 7, 10

TABLE OF AUTHORITIES – Continued

Page

*National Private Truck Council v. Oklahoma*, 515 U.S. 582 (1995) ..... 8

*O'Melveny & Meyers v. FDIC*, 512 U.S. 79 (1994) ..... 7

*Production Credit Association of Eastern New Mexico v. Taxation and Revenue Department*, 999 P.2d 1031 (N.M. Ct. App. 2000) ..... 1

*Rockford Life Insurance Co. v. Ill. Dept. of Revenue*, 482 U.S. 182 (1987) ..... 8

*Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575 (1928) ..... 12

*Smith v. U.S.*, 508 U.S. 223 (1993) ..... 9

*Tooke v. Miles City Production Credit Ass'n*, 763 P.2d 1111 (Mont. 1988) ..... 11

*U.S. v. Haynes*, 620 F.Supp. 474 (D. Tenn. 1985) ..... 11

*U.S. v. New Mexico*, 455 U.S. 720 (1982) ..... 11

*Waldschmidt v. Iowa Lakes Production Credit Ass'n*, 380 N.W.2d 704 (Iowa, 1986) ..... 10

*Woodland Production Credit Ass'n v. Franchise Tax Board*, 37 Cal. Rptr. 231 (Ct. App. 1964) ..... 8

STATUTES

12 U.S.C. § 2023 ..... 3

12 U.S.C. § 2077 ..... 3, 4, 8, 9

12 U.S.C. § 2098 ..... 3

12 U.S.C. § 2134 ..... 6

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

H.R. Report No. 425, 99th Cong., 1st Sess. 11, 1985 U.S.C.C.A.N. 2587 ..... 3

H.R. Rep. No. 593, 92nd Cong., 1st Sess. (1971), 1971 U.S.C.C.A.N. 2091 ..... 2

39 Stat. 360 (1916) ..... 2

Farm Credit Act of 1933, 48 Stat. 257 ..... 1

Farm Credit Amendments Act of 1985, 99 Stat. 1703-1707 (1985) ..... 3

1 *Farm Credit System Report* 8 (1999) ..... 5

## STATEMENT OF THE CASE

At issue in this case is whether the implied intergovernmental tax immunity doctrine first articulated in *McCulloch v. Maryland*, 17 U.S. (4 *Wheat.*) 316 (1819) should prohibit the States from taxing privately-held Production Credit Associations ("PCAs") absent an explicit authorization to tax, where Congress' intent to allow such taxation can be fairly inferred from commonly-accepted principles of statutory construction and the legislative history of the Farm Credit Act of 1933, 48 Stat. 257.

The New Mexico Court of Appeals correctly held that the intergovernmental immunity doctrine should not be applied blindly in these circumstances, and instead looked to Congress' intent in determining that PCAs were not immune from state taxation. *Production Credit Association of Eastern New Mexico v. Taxation and Revenue Department*, 999 P.2d 1031 (N.M. Ct. App. 2000). This same question (concerning "Banks for Cooperatives," also established by the Farm Credit Act of 1933) is currently pending before the Court in the case of *Director of Revenue v. CoBank, ACB*, No. 99-1972 (*cert. granted*, June 26, 2000). Because the question presented in that case is essentially identical to the question raised here, the Court should stay action on this Petition until a decision is rendered Case No. 99-1972 and deny certiorari at its conclusion, or alternatively, accept certiorari in this case and affirm the decision of the New Mexico Court of Appeals.

### A. History of the Production Credit Associations

The Farm Credit System traces its roots to the establishment of Federal Land Banks in 1916. 39 Stat. 360 (1916). From the earliest history of the Farm Credit System, it is apparent that Congress carefully considered the tax status of the various member institutions with respect to federal, state and local taxes. Significantly, Congress allowed the imposition of state and local property taxes on the Federal Land Banks even while federal property was exempt. 39 Stat. 360 (1916).

In an effort to increase the amount of capital available to farmers during the Great Depression, Congress enacted the Farm Credit Act in 1933, creating publicly-owned Production Credit Associations ("PCAs") and Banks for Cooperatives ("BFCs"). The enabling legislation for both types of institutions provided a mechanism for eventual private ownership, by requiring borrowers to take stock in the lending institutions as part of any loan. By 1968, Congress had achieved its goal of ending the public ownership of the PCAs and the BFCs. See, H.R. Rep. No. 593, 92nd Cong., 1st Sess. (1971), 1971 U.S.C.C.A.N. 2091, 2098.

When Congress created the PCAs, it spelled out their tax status in considerable detail. First, Congress specified that the PCAs and its obligations should be considered federal instrumentalities, *and as such* the notes, debentures and bonds of the PCAs should be exempt from federal, state and local taxes (except estate, inheritance and gift taxes). Congress went on to provide a broad exemption from local, state and federal taxes (except for property taxes on real and tangible property) so long as

the federal government held an ownership interest in the PCAs. Once the ownership interest ended, the states were free to tax the PCAs on the same basis as other for-profit ventures. The Banks for Cooperatives were subject to the same conditional exemption. 48 Stat. 257, 267. The conditional tax exempt status of these two institutions should be contrasted with the tax exemption provided to two other lending institutions created by the Farm Credit Act of 1933, Farm Credit Banks (12 U.S.C. § 2023), and Federal Land Bank Associations (12 U.S.C. § 2098). Those institutions were provided with a broad exemption from all taxation except property taxes on real and personal property.

In 1971 the Farm Credit Act was substantially amended, but the differing tax treatment afforded to the component entities of the Farm Credit System remained unchanged.

In 1985, Congress made significant changes in the Farm Credit System in response to an on-going farm crisis. Farm Credit Amendments Act of 1985, 99 Stat. 1703-1707 (1985). A major objective of the legislation was to reduce the involvement of the Farm Credit Administration in the day-to-day operations of the member institutions of the Farm Credit System, and to strengthen its role as a regulator of the institutions. H.R. Report No. 425, 99th Cong., 1st Sess. 11, 1985 U.S.C.C.A.N. 2587. One piece of that legislation was a "technical and conforming" amendment which struck numerous outmoded references to the "Governor of the Farm Credit Administration" and which amended 12 U.S.C. § 2077 to eliminate both the PCAs' statutory exemption from tax and that exemption's

conditional phase-out provision for publicly-owned PCAs. Because the stock of all PCAs had been privately held since 1968, both the exemption and its phase-out provision were now surplusage. The exception had long-since swallowed the rule.

### B. The Decision Below

The New Mexico Court of Appeals held that PCAs were instrumentalities of the United States, and were therefore entitled to implied immunity from state and local taxation unless the same had been waived. Petition pp. 6a-7a. The court went on to hold that the provisions of 12 U.S.C. § 2077 were ambiguous in light of the express language contained in the 1933 and 1971 Farm Credit Acts where Congress expressed its intent to subject privately-held PCAs to state and local taxation. *Id.* at 9a-10a. The court concluded that Congress' intent in eliminating the last two sentences in 12 U.S.C. § 2077 was simply to eliminate surplus language, since all PCAs had been privately held since 1968. The court also found that the legislative history of Pub. L. 99-205, indicating Congress intended to make only "technical and conforming" amendments to the 12 U.S.C. § 2077, coupled with the absence of any mention of reversing a fifty-year policy of allowing state taxation in House Report No. 425, negated any inference that Congress intended to reinstitute state tax immunity. *Id.* at 11a-12a. Most significantly, the court below concluded that *McCulloch* should apply only when Congress has been silent on the issue of state taxation; where Congress has spoken, it is up to the courts to ascertain Congress' intent. *Id.* at 13a. The court concluded that Congress has "unequivocally evinced its unwavering

intention to subject privately owned credit associations to state income taxation." *Id.* at 14a.

### C. Misstatements of Fact

Petitioner warns that if the decision below stands it will have "serious negative implications" for the financial condition of not just the PCAs, but also for farmers and ranchers who rely on them for loans. Petition, p. 10. There is no foundation for this claim in the record. No evidence has been tendered that the PCAs are in any financial peril.[1] The argument is counter-intuitive at best, since the income taxes at issue here are imposed only on net profits. The PCAs could reduce or eliminate any state income tax liability simply by lowering the interest rates they charge to the farmers and ranchers who borrow from them. Petitioner further warns (Petition, p. 11) of the potential for "very large retroactive tax liabilities" if the decision below is not reversed. That claim is also highly speculative. The Petitioner in this case, as in other reported PCA cases, seeks a refund of taxes previously paid. *See, e.g, Farm Credit Serv. of Mid-America v. Department of State Revenue*, 705 N.E. 2d 1089 (Ind. Tx. Ct. 1999); *In re Petition of Farm Credit of Western New York, et al.*,

---

[1] The *1998 Report on the Financial Condition and Performance of the Farm Credit System* published by the Farm Credit Administration notes that the member institutions of the Farm Credit System "continued to reflect strong financial performance, particularly in earnings and growth." The Direct Lender Associations (PCAs, Agricultural Credit Associations and Federal Land Credit Associations) reported net income of $704 million, up from $521 million in 1994. 1 *Farm Credit System Report* 8, 29 (1999).

Docket Nos. 816576, 816605 and 816606 (N.Y. Div. of Tax Appeals 1/13/2000) (RIA State and Local Taxes).

## REASONS FOR DENYING THE WRIT

### A.

### CERTIORARI SHOULD NOT BE GRANTED WHERE THE SAME QUESTION IS CURRENTLY BEFORE THE COURT

Certiorari should not be granted in this case because the same issues are currently before the Court in *Director of Revenue v. CoBank, ACB,* No. 99-1972 (*cert. granted,* 6/26/00). The resolution of that case should be dispositive of the question presented here where: (a) the tax immunity afforded to Banks for Cooperatives, 12 U.S.C. § 2134, is identical to the immunity provided for PCAs, 12 U.S.C. § 2077; (b) the legislative history of the two statutes is identical, and (c) the PCAs and the Banks for Cooperatives share a common purpose, structure and relationship to the federal government. Further review of the question presented here for PCAs should be unnecessary. Alternatively, the Court should stay action on this Petition until a decision is rendered in Cause No. 99-1972, at which time certiorari should be granted for the purpose of affirming the decision of the court below.

## B.

## CERTIORARI SHOULD NOT BE GRANTED WHERE THE COURT BELOW CORRECTLY DETERMINED THAT CONGRESS' INTENT TO SUBJECT PCAs TO STATE INCOME TAX WAS CLEAR, OBVIATING THE NEED FOR IMPLYING AN IMMUNITY UNDER *McCULLOCH v. MARYLAND*

The court below correctly held that Congress had expressed its intention to allow state taxation of privately-held PCAs, eliminating any need to apply a separate implied immunity analysis under *McCulloch v. Maryland*. Petition, p. 13a. Because the decision of the New Mexico Court of Appeals is correct in its reasoning and result, certiorari is unnecessary.

### 1. Where a Limited Immunity is Established by Statute, No Broader Immunity Should Ordinarily be Implied

Because Congress has explicitly addressed the question of how much immunity should be provided to PCAs, this Court should assume, in the absence of evidence to the contrary, that Congress intended to afford just that much immunity from taxation and no more. "[M]atters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 85 (1994). "*Inclusio unius, exclusio alterius*. . . . To create additional 'federal common law' exceptions is not to 'supplement' this scheme, but to alter it." *Id.* at 86-87.

The principle that additional preemption should not be inferred where Congress has spoken has particular

application to state taxation. *See, Department of Revenue of Oregon v. ACF Industries, Inc., et al.*, 510 U.S. 332, 345 (1994) ("When determining the breadth of a federal statute which impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope."); *Rockford Life Insurance Co. v. Ill. Dept. of Revenue*, 482 U.S. 182, 191 (1987) ("A court must proceed carefully when asked to recognize an exemption from taxation that Congress has not clearly established."). *See also, National Private Truck Council v. Oklahoma*, 515 U.S. 582 (1995) (federal statutes are construed against the background presumption of non-interference with state taxation).

In the present case, Congress' intent to allow state taxation is evident not only from the express preemption in 12 U.S.C. § 2077, which is limited to taxation of bonds, notes and debentures, but from the history of that statute and the background of the PCAs as well. From their inception, the PCAs (and Banks for Cooperatives) were never afforded the degree of immunity afforded the Federal Land Banks and other components of the Farm Credit System. The broad immunity from state taxation, in the (repealed) second sentence of § 2077, which was provided to the PCAs was always contingent on a federal ownership interest. The (repealed) third sentence of § 2077 phased out the broad exemption upon PCAs' becoming privately owned. When both the contingency and the exemption were removed in 1985, Congress was presumably aware that privately-held PCAs had been held subject to state taxation, *see, e.g., Woodland Production Credit Ass'n v. Franchise Tax Board*, 37 Cal. Rptr. 231, 233 (Ct. App. 1964), yet Congress did not retain the broad

exemption from tax in the second sentence of § 2077, which would have re-established immunity for the privately-held PCAs. The contemporaneous record of the 1985 legislative changes indicates Congress intended to make only "technical and conforming" changes to the statute, not a reversal of fifty years of tax policy. Finally, the explicit income tax exemption which Congress provided to Farm Credit Banks and Federal Land Bank Associations removes any doubt as to what Congress intended. *Smith v. U.S.*, 508 U.S. 223, 233 (1993) ("Just as a single word cannot be read in isolation, nor can a single provision of a statute."). The court below correctly relied on this overwhelming evidence of congressional intent to conclude that there was no room to engraft a doctrine of implied immunity under the Supremacy Clause to reach a contrary result.

### 2. PCAs Are Not So Closely Connected to the Federal Government as to Require a Presumption of Immunity from State Taxation.

In *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821 (1997), this Court ruled that PCAs were not sufficiently close to the federal government to fall within the exception from the Tax Injunction Act afforded to the federal government. "An instrumentality of the United States can enjoy the benefits and immunities conferred by *explicit statutes*, however, without the further inference that the instrumentality has all of the rights and privileges of the National Government." *Id.*, at 829 (emphasis added). After listing the various tests employed by the courts for determining whether a particular entity may sue to enjoin state taxes in federal court, this Court held

that the PCAs met none of them. *Id.*, at 831. The PCAs' business purpose was making commercial loans, they were privately-owned, and they did not exercise powers analogous to federal departments or regulatory agencies. *Id.* at 831-32. There is no reason to adopt a different analysis when determining whether the PCAs should now enjoy an implied, constitutional immunity from taxation under *McCulloch*.

The result in *Farm Credit Services* is consonant with the established rule that courts are not bound by statutory labels when discerning the constitutional rights or obligations of the government. *See, e.g., Lebron v. Nat. R.R. Passenger Corp.*, 513 U.S. 374 (1995) (Amtrak an arm of the government for the purposes of the First Amendment despite its statutory designation-as a private corporation); *Andrews v. Federal Home Land Bank of Atlanta*, 998 F.2d 214 (4th Cir. 1993) (Federal Land Bank not an arm of the government for the purposes of the First Amendment despite its statutory designation as an instrumentality of the United States). *See also, Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44-45 (1994) (for purposes of Eleventh Amendment immunity, statutory characterization of entity is only one factor in analysis).

With regard to PCAs in particular, the courts have generally treated them like private parties, and not the government, on a host of issues. *Hanna v. Federal Land Bank Ass'n of Southern Illinois*, 903 F.2d 1159 (7th Cir. 1990) (PCAs subject to jury trials); *In re Hoag Ranches*, 846 F.2d 1225 (9th Cir. 1988) (PCAs are not afforded the government's extended period of time to file a notice of appeal); *Waldschmidt v. Iowa Lakes Production Credit Ass'n*, 380 N.W.2d 704 (Iowa, 1986) (PCAs are not protected by the

Federal Tort Claims Act); *Tooke v. Miles City Production Credit Ass'n*, 763 P.2d 1111 (Mont. 1988) (same); *U.S. v. Haynes*, 620 F.Supp. 474 (D. Tenn. 1985) (indictment against PCA employee for engaging in a conflict of interest with the federal government dismissed because PCA was not the federal government).

The concept that instrumentalities like the PCAs should not automatically be treated as the federal government itself is reflected in this Court's modern intergovernmental immunity cases. Both explicitly and implcitly, the Court has drawn a distinction between state taxes imposed directly upon the United States, for which an express waiver of immunity has been required, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989), and taxes imposed on federal instrumentalities. In the latter situation, this Court has looked to the content of the legislation creating the instrumentality and the nature and governmental purpose of that instrumentality. *U.S. v. New Mexico*, 455 U.S. 720, 735 (1982) ("[T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.").

The Petitioner cites *Mayo v. United States*, 319 U.S. 441 (1943) to support its contention that immunity for instrumentalities is automatic. The holding in *Mayo* does not conflict with the decision below; in fact *Mayo* supports it. In *Mayo*, the United States Department of Agriculture was subject to a direct tax upon its property. In striking down the tax, this Court drew a distinction between state taxes laid directly upon the government, for which

express consent was required, and taxes laid upon federal instrumentalities, for which it was appropriate to consider the context of the legislation and purpose of the instrumentality:

> The silence of Congress as to the subjection of its instrumentalities, *other than the United States*, to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction. [citation omitted] But where, as here, the governmental action is carried out by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues.

319 U.S. at 447-48. (emphasis added).

The case of *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575 (1928) cited by the *Mayo* Court is also instructive. In holding that the Secretary of Interior lacked the implied authority to confer immunity from state royalty taxes on land purchased for Indians from Indian trust money, this Court wrote: "What Government instrumentalities will be held free from state taxation, though Congress has not expressly so provided, cannot be determined apart from the purpose and character of the legislation creating them." 276 U.S. at 578.

In the present case, Congress has specified that the PCAs are instrumentalities of the federal government, but it does not follow that the PCAs are the government itself. They are hybrid creatures at best, performing some limited functions which government might otherwise carry out, but organized for private profit. There is no

compelling reason why an immunity from taxation must be inferred for such entities.

## CONCLUSION

For the reasons set forth above, Respondent prays for an order denying certiorari in this case, or alternatively, for an order granting certiorari and affirming the decision of the New Mexico Court of Appeals.

Respectfully submitted,

PATRICIA MADRID
Attorney General of New Mexico

DONALD F. HARRIS
*Counsel of Record*
BRUCE J. FORT
Special Assistant Attorneys General
New Mexico Taxation and Revenue Department
P.O. Box 630
Santa Fe, New Mexico 87509
(505) 841-6583